No. 82-1126

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH M. MARGIOTTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a political party leader who is found to be a de facto public official may be held to the same standards as public officials for purposes of the mail fraud statute, 18 U.S.C. 1341.

2. Whether the evidence was sufficient to support petitioner's convictions under the Hobbs Act, 18 U.S.C. 1951, on the theory that, while not a public official himself, he caused public officials to induce extortionate payments "under color of official right."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Page

Cases—Continued:

Constitution, statutes and regulation:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-71a) is reported at 688 F.2d 108.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1982. A petition for rehearing was denied on November 5, 1982. The petition for a writ of certiorari was filed on January 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of mail fraud, in violation of 18 U.S.C. 1341, and five counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to concurrent prison

terms of two years on each count. The court of appeals affirmed (Pet. App. 1a-71a).

1. The evidence adduced at trial is recounted in detail in the opinion of the court of appeals (Pet. App. 5a-19a). It showed that petitioner was the Chairman of the Republican Committee of both Nassau County and the Town of Hempstead, New York (*id.* at 5a). Although he held no Town or County office, he became deeply involved in affairs of government and exercised a "vise-like grip" over the basic governmental functions in these jurisdictions (*id.* at 12a). In particular, petitioner dominated the governmental administration of insurance affairs (*id.* at 12a-13a). Through his "control" of the Presiding Supervisor of Hempstead and the Nassau County Executive, he was able to select the Broker of Record for those jurisdictions, who had authority for obtaining insurance on municipal properties (*id.* at 6a-7a, 12a). And when insurance brokers sought government business, they undertook discussions with petitioner, not with public officials (*id.* at 13a). If petitioner declined their offers, they did not even appeal to the public officials because "there was no place else to go" (*ibid.*).

Petitioner also played a substantial role in making governmental hiring and promotion decisions (Pet. App. 14a-15a). Through his control of the program staffing officer for Nassau County, petitioner would see to it that County jobs went to persons who had actively supported the local Republican Party (*id.* at 14a). Petitioner himself would interview individuals applying for high level County positions (*ibid.*). He would also personally approve or disapprove promotions and salary increases based upon the individuals' political activity and financial contributions to the Republican Party (*ibid.*). Petitioner played substantially the same role in the government of the Town of Hempstead (*id.* at 15a).

In 1968, petitioner struck a deal with insurance broker Richard B. Williams according to which Williams' insurance agency would be named Broker of Record for the Town of Hempstead and, in return for the appointment, the Agency would set aside 50% of the insurance commissions it received, to be distributed as specified by petitioner (Pet. App. 16a). The Williams Agency was subsequently appointed as Hempstead's Broker of Record pursuant to the agreement (*id.* at 6a-7a). In 1971, the Williams Agency was appointed, under the same arrangement, as Broker of Record for Nassau County (*id.* at 6a-7a, 16a). Among the recipients of the kickbacks paid by the Williams Agency were numerous insurance brokers who performed no legitimate work, lawyers, and other friends of petitioner, including a convicted former Nassau County District Attorney and a former State Supreme Court Justice who was ultimately disbarred (*id.* at 7a, 16a-17a).[1]

Indeed, petitioner himself also benefitted from the kickback arrangement. On one occasion after advising one Robert Dowler that Dowler was to receive $10,000, petitioner obtained Dowler's agreement to pay him one half of

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[1]During the period at issue, the Williams Agency received more than $2.2 million in commissions and other compensation (Pet. App. 7a), and hundreds of thousands of dollars in kickbacks were distributed by petitioner as "the spirit moved [him]" (Tr. 2980-2981). The largest recipient of money paid by the Williams Agency (approximately $118,000) was William Cahn, a former Nassau County District Attorney who was convicted of mail fraud. Cahn received $2000 a month from the day he left office (January 1, 1975) until April 1, 1977, when he went to jail. At petitioner's direction, and despite objections by the Williams Agency (Tr. 975-976, 981-982), $2000 a month was then paid to Cahn's son until January 1980 (Tr. 982). Another recipient, a New York State Assemblyman, received approximately $50,000 in 1979 and 1980 (Tr. 2907). Petitioner apparently overlooks these payments in stating (Pet. 6) that the kickbacks exacted from the Williams Agency ceased in 1978.

that amount (Tr. 1674-1675). After receiving the $10,000 from Williams, Dowler gave petitioner a check for $5,000, which petitioner used to pay his delinquent Nassau County property taxes (Tr. 2986).

The concealment of the kickback scheme was achieved through the preparation of fictitious property inspection reports that gave the appearance that the recipients of the kickbacks were legitimately earning commissions (Pet. App. 18a). In addition, petitioner and several other recipients of the kickbacks gave false and misleading testimony to a State Investigation Commission when it inquired into the scheme in 1977 and 1978 (*ibid.*).

2. The principal factual defense at trial—reiterated in the petition—was that petitioner was simply following a long-established patronage practice of having the Broker of Record split his commissions with other brokers who did no work. This claim underlay petitioner's motion to dismiss on grounds of selective prosecution, which the district court summarily denied. It found (Jan. 21, 1982 Tr. 21-22):

> [There is] no evidence in this record that anyone else obtained a patronage fund of insurance by the sale of public office, or that anyone else engaged in extortion. And the fact that others engaged in such plainly criminal conduct would be a poor defense to its repetition.

The jury too rejected petitioner's defense of good faith, after being thoroughly instructed in unexceptionable language (Tr. 3578-3583).

3. The court of appeals affirmed the conviction on all counts. With regard to the mail fraud count the court stated that Section 1341's disjunctive wording establishes that it is not limited to schemes to obtain money or property, and accordingly concluded that it covers breaches of fiduciary duty, including depriving citizens of their right to the

honest and loyal services of government officials (Pet. App. 22a-23a). By the same token, the court held, one who did not hold public office could be covered by the statute provided he in fact controlled the governmental decision-making process, and "others rel[ied] upon him because of a special relationship in the government" (*id.* at 24a). In this case, the court found, the trial judge instructed the jury to that effect, and "[t]he evidence established not only that [petitioner] was responsible for the administration of the municipal insurance activities, but also that he acted as a virtual Department of Personnel, with substantial power over decisions concerning hiring, promotions and salary increases" (*id.* at 25a; see also *id.* at 33a). In the exercise of that authority, petitioner had engaged in a "secret scheme, pursuant to which his recommendation of the Williams Agency was made on the understanding that the Agency would kick back a portion of its compensation to Margiotta's political allies" (*id.* at 35a). The court also rejected First Amendment concerns raised by petitioner, concluding that its narrow construction of the statute to reach egregious conduct like petitioner's would not chill protected political activity (*id.* at 38a-39a).

With regard to the Hobbs Act counts, the court unanimously held that petitioner, though not a public official, was guilty of extortion "under color of official right" (18 U.S.C. 1951(b)(2)) pursuant to 18 U.S.C. 2(b), since he had "willfully cause[d] an act to be done which if directly performed by him or another would be an offense against the United States" (Pet. App. 43a). In this case petitioner had caused public officials to commit the acts necessary for inducing the Williams Agency to make kickback payments (*id.* at 45a).

Judge Winter concurred in upholding the Hobbs Act convictions, finding that petitioner "was not the instrument of a party organization executing well understood patronage practices," and that "the entire kickback scheme [was]

extortionate" (Pet. App. 60a). With regard to the mail fraud count, he found "substantial and direct precedent" for "much of what" the majority said on that issue (*id.* at 64a-65a), but would have held that one not holding public office could not be subjected to whatever fiduciary standards governed the conduct of public officials (*id.* at 66a).

In response to petitioner's suggestion of rehearing en banc, three other judges joined Judge Winter in voting for rehearing, but only with respect to the affirmance of the mail fraud conviction (Pet. App. 72a-73a). In doing so, those who were not on the panel did not indicate disagreement with the panel's conclusion, but only their belief that "the fundamental and recurring issue" of applying mail fraud to intangible rights warranted en banc consideration (*id.* at 73a).

ARGUMENT

The decision below is correct, is supported by substantial precedent, and conflicts with no decision of this Court or of any other court of appeals. Review by this Court is unwarranted.

1. Petitioner devotes the bulk of his petition to the argument that the court of appeals erred in affirming his conviction for mail fraud. The court of appeals held that "individuals who in reality or effect are the government owe a fiduciary duty to the citizenry" regardless of whether they hold a de jure public office (Pet. App. 29a), and that a secret agreement by such an individual to use his influence to secure a public favor for another in return for kickbacks defrauds the public of its right to his honest and faithful participation in the affairs of government. As Judge Winter acknowledged in dissent, there is "substantial and direct precedent" for the court's holding, which in any event was carefully "limit[ed] * * * to the facts of this case" (*id.* at 63a, 65a).

a. Petitioner's first argument illustrates the truth of Judge Friendly's observation that "Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling * * *." *United States* v. *Travers*, 514 F.2d 1171, 1174 (2d Cir. 1974). Parroting the predictions in Judge Winter's dissent, and ignoring the explicit limitations in the court's opinion, petitioner suggests that review is required because the court of appeals had held " 'that a mail fraud conviction will be upheld when a politically active person is found by a jury to have assumed a duty to disclose material facts to the general citizenry' "(Pet. 11, quoting Pet. App. 60a). There will be, petitioner threatens, " 'no end to the common political practices which may now be swept within the ambit of mail fraud' " (*id.* at 11a, quoting Pet. App. 63a). Indeed, "[e]very political leader, candidate, lobbyist, and interest group—even an influential religious leader or newspaper editor—may be exposed to criminal sanction based on involvement in 'governmental affairs' " (Pet. 11).

Responding to these forebodings, the court of appeals noted that petitioner had simply "overlook[ed] our narrow construction of the mail fraud statute. The necessity of meeting our restricted tests for the existence of a duty as a government fiduciary on the part of those who technically hold no public office precludes the use of § 1341 for dragnet prosecutions of party officials" (Pet. App. 39a). Petitioner was not, the court pointed out, simply "a politically active person." On the contrary, he

> had a stranglehold on the respective governments of Nassau County and the Town of Hempstead. According to * * * one of Margiotta's principal assistants, "everything went through his hands." The evidence established not only that he was responsible for the administration of the municipal insurance activities,

> but also that he acted as a virtual Department of Personnel, with substantial power over decisions concerning hiring, promotions and salary increases. Others relied upon him for the rendering of important governmental decisions, and he dominated governmental affairs as the de facto public leader. As a result, the federal mail fraud statute properly supported a prosecution for Margiotta's breach of at least a minimum duty not to sell his substantial influence and control over governmental processes.

(*Id.* at 25a-26a.) Moreover, the court stressed that petitioner's violation of the mail fraud statute was not simply a case of a "politically active person" ignoring his duty to disclose material facts (*id.* at 35a):

> The breach of fiduciary duty on which his mail fraud prosecution has been predicated is not his failure to make decisions on the basis of merit, or on any misrepresentation or omission concerning his partiality. Rather, the crux of Margiotta's impropriety is the secret scheme, pursuant to which his recommendation of the Williams Agency was made on the understanding that the Agency would kick back a portion of its compensation to Margiotta's political allies. Ample evidence, including the testimony of Richard A. Williams and Margiotta himself, supports the Government's contention that this secret deal was struck and followed over the course of several years.

In short, three critical elements were necessary to sustain petitioner's mail fraud conviction: first, a relationship with Nassau County and the Town of Hempstead which made petitioner "a de facto leader of government * * * who was relied upon by individuals in government for the administration of governmental affairs" (Pet. App. 58a); second,

"the secret scheme, pursuant to which [petitioner's] recommendation of the Williams Agency was made on the understanding that the Agency would kick back a portion of its compensation" (*id.* at 35a); and third, the failure to disclose this scheme "to those in the government who relied upon him" (*id.* at 37a).

Accordingly, it is plain that rather than opening a Pandora's box, the majority opinion simply stands for the unremarkable proposition that any individual who takes effective control of the process of city or county government owes the same standard of fidelity as one who is formally elected or appointed to public office. Petitions for certiorari have been consistently denied in numerous cases in which public officials have been found guilty of defrauding the public of its right to honest and faithful participation in the affairs of government by making corrupt agreements of the kind at issue here. *E.g., United States* v. *Mandel*, 591 F.2d 1347, 1358-1364 (4th Cir.), aff'd en banc, 602 F.2d 653 (1979), cert. denied, 445 U.S. 961 (1980); *United States* v. *Keane*, 522 F.2d 534 (7th Cir. 1975), cert. denied 424 U.S. 976 (1976); *United States* v. *Isaacs*, 493 F.2d 1124, 1149-1150 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *United States* v. *States*, 488 F.2d 761, 763-766 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974). The unique nature of petitioner's role in the affairs of government, which the jury found here, makes this case little different from those cases. Cf. *United States* v. *Del Toro*, 513 F.2d 656, 663 & n.4 (2d Cir.), cert. denied, 423 U.S. 826 (1975).

b. The foregoing analysis also sufficiently disposes of petitioner's claim that the court of appeals' decision is "[u]nprecedented and [u]nsupported" (Pet. 13). There is, as we have observed and as the dissenting opinion acknowledged, ample precedent for the holding of the court of appeals. Indeed, petitioner's argument rests not on the

absence of precedent, but on the premise that all the mail fraud cases applying Section 1341 to schemes to defraud of intangible rights were wrongly decided. This Court has repeatedly declined to review cases rejecting that argument. *United States* v. *Mandel, supra*; *United States* v. *Keane, supra*; *United States* v. *States, supra*; *United States* v. *Isaacs, supra*; *Shushan* v. *United States*, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574 (1941); *United States* v. *Buckner*, 108 F.2d 921 (2d Cir.), cert. denied, 309 U.S. 669 (1940); *United States* v. *Von Barta*, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States* v. *Bronston*, 658 F.2d 920 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982). See also *United States* v. *Brown*, 540 F.2d 364, 374 (8th Cir. 1976).

c. Petitioner next argues (Pet. 15-16) that the court of appeals erred in supposing "that the federal mail fraud statute creates *federal* fiduciary duties." We need not tarry long over this contention. In an alternative holding incorrectly characterized by petitioner as dictum, the court of appeals found that it was unnecessary to reconcile petitioner's "principles of federalism with the mandate of the mail fraud statute because Margiotta owed a fiduciary duty to the citizenry of Hempstead and Nassau County under New York law" (Pet. App. 29a). Petitioner claims that the detailed analysis of New York law undertaken by the court of appeals is erroneous (Pet. 15-16 n.5). While we disagree with petitioner in this, it is hardly necessary to grant certiorari to review the propriety of the majority's analysis of New York law.

It is in any event well settled that a violation of local law is not an element of a mail fraud offense. See, *e.g.*, *United States* v. *Von Barta, supra*, 635 F.2d at 1007; *United States* v. *Mandel, supra*, 591 F.2d at 1362; *United States* v. *Bush*, 522 F.2d 641, 646 n.6 (7th Cir. 1975); *United States* v. *States, supra*, 488 F.2d at 764; *United States* v. *Edwards*,

458 F.2d 875, 880 (5th Cir.), cert. denied, 409 U.S. 891 (1972). The purpose of the mail fraud statute is to prevent the Postal Service from being used to carry out fraudulent schemes, regardless of the exact nature of the scheme or of whether or not the scheme happens to be forbidden by state law. See *Parr* v. *United States*, 363 U.S. 370, 389, 390 (1960). Mail fraud is in this respect materially different from offenses such as that descibed in the Travel Act (18 U.S.C. 1952), which derive from Congress's power under the Commerce Clause, are meant to supplement state law enforcement, and are keyed to the presence of independently unlawful activity.[2]

d. Petitioner next argues that the court of appeals' decision "directly impinges upon the First Amendment" (Pet. 16). But it is plain that petitioner is not alleging that *his* prosecution for mail fraud violated the First Amendment. Petitioner does not suggest that a party leader may not be punished for entering into a corrupt agreement to procure a public position for another in return for kickbacks, or that the use of the mails in furtherance of such a scheme may not

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[2]Petitioner's reliance on *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977), is misplaced. The Court there held that the use of the term "fraud" in Rule 10b-5 (17 C.F.R. 240.10b-5) did not extend to "all breaches of fiduciary duty in connection with a securities transaction" (430 U.S. at 472). The reason was that the statute itself (15 U.S.C. 78j(b)) spoke not of "fraud" but of "manipulation" and "deception," and its less expansive language controlled the interpretation of the Rule. 430 U.S. at 472-473. Here, by contrast, the mail fraud statute itself expressly applies to "any scheme or artifice to defraud" (18 U.S.C. 1341). Petitioner's conduct, by virtue of his control of the local government, was clearly a fraud on the citizenry of Hempstead and Nassau County. As this Court stated long ago in *Badders* v. *United States*, 240 U.S. 391, 393 (1916), "Congress may * * * forbid any such act done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not," since "[t]he overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate."

be punished. As the court of appeals correctly observed (Pet. App. 38a-39a): "Since the conduct charged in the Indictment was within the power of the United States Government to proscribe and there is no indication that the application of the mail fraud statute in this specific case would deter protected political activities in other contexts, the prosecution of [petitioner] under Count One did not violate the First Amendment. *See Broadrick* v. *Oklahoma*, * * * 413 U.S. [601,] 615 [1973]."

Petitioner's argument is, again, ultimately nothing more than a series of "Cassandra-like predictions" about the consequences the court's decision may have in other contexts. According to petitioner, the court held that a party chairman must act as a " 'disinterested' fiduciary for the whole electorate, including political opponents" (Pet. 16). And according to the dissenting opinion, the court subjected "politically active persons to criminal sanctions based solely upon what they say or do not say in their discussions of public affairs" (Pet. App. 64a). Both claims simply ignore the carefully limited holding of the panel majority, which properly noted (*id.* at 38a):

> The First Amendment concerns raised by [petitioner] * * * are a chimera. Count One of the indictment and the pertinent jury instructions do not address mere participation in the political process or protected conduct such as lobbying or party association. Rather than resting on a generalized breach of duty to render disinterested services on the part of one who participates in the political process in some unspecified way, the indictment and prosecution focused on whether [petitoner's] corrupt agreement breached a fiduciary duty which [he] owed as a result of his significant role in the governance of Hempstead and Nassau County.

e. Petitioner's final argument regarding his mail fraud conviction is that he was deprived of fair notice that his conduct was wrongful. This contention is frivolous.

Petitioner, who was a lawyer, himself acknowledged at trial that his corrupt agreement with the Williams Agency could be illegal (Pet. App. 40a). Section 1341 has for decades been applied to undisclosed agreements that constitute a breach of fiduciary duty (*United States* v. *Buckner, supra*; *Shushan* v. *United States, supra*), and the court of appeals explicitly found that petitioner had breached a fiduciary duty he owed under New York law. Moreover, this Court over a century ago described agreements for the sale of public office to be "inconsistent with sound morals and public policy." *Tool Company* v. *Norris*, 69 U.S. (2 Wall.) 45, 55 (1865). The New York Court of Appeals has long taken a similar position, explaining that "public service will rapidly degenerate and become corrupt if appointments to office are dictated by money offered or paid instead of that merit and capacity which should alone be regarded." *Deyoe* v. *Woodworth*, 144 N.Y. 448, 450 (1895). The purchase and sale of public office or place is accordingly proscribed by the penal laws of New York and the United States, without regard to whether the recipient of the payment is a public official. N.Y. Elec. Law § 17-158(3) (McKinney 1978); N.Y. Penal Law § 200.50 (McKinney 1975); 18 U.S.C. 210. Although the court of appeals in this case declined to overturn the trial court's ruling that those statutes were technically inapplicable, it noted that at the very least they "provide analogous authority for a finding of fiduciary duty" (Pet. App. 32a n.20). Under these circumstances, and given a jury instruction requiring a finding that petitioner acted knowingly and willfully in a fraudulent manner, and with bad faith (Tr. 3578-3583), petitioner's suggestion that he had no fair warning that he was breaching a fiduciary duty is completely devoid of merit.

Once more petitioner's contention is nothing more than an oracular prediction that the court of appeals' holding "opens the door to arbitrary, capricious and discriminatory use of the federal mail fraud statute" (Pet. 18). That misuse, he suggests, is "illustrated dramatically in the present case where only Petitioner was prosecuted for a patronage practice that had existed for more than fifty years and involved thousands of persons" (*ibid.*). A sufficient answer to this contention is the fact that the trial court rejected petitioner's claim of selective prosecution, and the jury rejected petitioner's "good-faith" defense based on his reliance on alleged similar prior practices by others. Even Judge Winter's partial dissent acknowledged that petitioner "was not the instrument of a party organization executing well understood patronage practices" (Pet. App. 60a).[3] At issue in this case is not some generic practice of commission sharing, but a course of conduct that the court of appeals unanimously agreed was corrupt and extortionate. While

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[3]It unnecessary to belabor the point with a detailed discussion of the distinctions between petitioner's conduct and other fee-splitting practices. We simply observe that while the sharing of insurance commissions with nonworking brokers may have been a widespread practice, the manner in which it was practiced was different in various places, and it was those differences that dictated whether criminal prosecutions were brought. In no other case was it marked, as it was here, by payoffs to attorneys, judges, and party officials who were not licensed insurance brokers—a practice never sanctioned by the New York Insurance Department (Tr. 1214-1215, 1224). Here, moreover, the kickbacks were a payoff for the sale of the position of Broker of Record, and were concealed by the preparation of fictitious property inspection reports and false testimony to a State Investigation Commission. As the New York State Investigation Commission observed: "The SIC is aware that criminal indictments have been returned in certain situations involving misapplied insurance commissions. In other situations involving misapplied insurance commissions, the evidentiary distinctions have been such as to frustrate prosecution for criminal wrongdoing under existing statutes." *1978 Annual Report of the Temporary Commission of Investigation of the State of New York to the Governor and the Legislature of the State of New York* 165-166 (1979).

the dissent raised questions about the implications of the court's mail fraud holding, it is plain that those concerns are unwarranted in the context of the instant prosecution.

f. Petitioner was sentenced for his mail fraud conviction to a two-year term, to run concurrently with the two-year terms imposed for each of his five Hobbs Act convictions. Thus, regardless of the validity of petitioner's conviction on this count, he still would serve the same sentence if his Hobbs Act convictions were upheld. If the Court should decide, as we next show, that petitioner's Hobbs Act claim is unworthy of review, this would be an appropriate occasion, as an exercise of discretion under the concurrent sentence doctrine, to decline to review the issues raised by petitioner with regard to his mail fraud conviction. See *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *Benton* v. *Maryland*, 395 U.S. 784, 791 (1969). The alternative would be to render an essentially advisory opinion respecting petitioner's hypothetical suppositions about possible future abuses of the mail fraud statute.

2. Petitioner also challenges the court of appeals' unanimous holding that, in Judge Winter's words, "the entire kickback scheme [was] extortionate" (Pet. App. 60a). In particular petitioner, who was convicted of inducing the Williams Agency to make kickback payments "under color of official right" and by wrongful use of fear, argues that it could not, as a matter of law, be established that the consent of the Williams Agency was induced "under color of official right" (Pet. 20-24).[4]

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[4]Petitioner "challenges" in a footnote (Pet. 24 n.9), without supporting argument, his conviction for extortion through wrongful use of fear. He also claims (Pet. 24), without particularization, that his Hobbs Act convictions should be reversed "because the inclusion of the improper mail fraud count allowed the prosecution to introduce otherwise irrelevant evidence concerning Petitioner's partisan patronage activities." But all of the evidence introduced on the mail fraud count was relevant

The district court ruled that petitioner could not be convicted as a principal acting "under color of official right" (18 U.S.C. 1951(b)(2)). Instead it directed the jury, pursuant to 18 U.S.C. 2(b), that it could convict only if it found that petitioner "caused officials of the Town of Hempstead and Nassau County under color of office to contribute in a substantial way to inducing the Williams Agency to consent to pay out the monies referred to in Counts Two through Six" (Tr. 3591). The jury was also instructed that, in determining whether the action of public officials contributed in a substantial way to bringing about the payments, it should consider "whether or not the payments alleged were, in fact, induced by the conduct of the public official in his official capacity and not solely by conduct of the defendant" (*ibid.*).[5]

This charge correctly articulated the standard required by 18 U.S.C. 2(b), which permits conviction of one who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States * * *." As the court of appeals held (Pet. App. 44a-45a):

> One of the indispensable elements in the extortion kickbacks from the Williams Agency was the official act of Ralph Caso and other public officials of Nassau

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to the Hobbs Act counts, because it concerned the issues of petitioner's power over the local governments and the reasonableness of the victims' fear of economic loss if they did not make the payments demanded of them. Indeed, the question of relevance is so clear that petitioner did not raise this argument in the court of appeals.

[5]See *United States* v. *Furey*, 491 F.Supp. 1048, 1067 (E.D. Pa.), aff'd, 636 F.2d 1211 (3d Cir. 1980), cert. denied, 451 U.S. 913 (1981) (defendant could be convicted of extortion under color of official right "even though he was no longer tax assessor" if he assured the victim that he could "cause" the present tax assessor "to make a lower tax assessment").

> County and the Town of Hempstead in appointing and retaining the Williams Agency as Broker of Record. Had that conduct, which the jury could reasonably find from the evidence was caused by Margiotta, never occurred, the Williams Agency would not have been in a position to make the challenged payments. If the public officials were aware that the Agency was making the kickbacks at the direction of Margiotta as a result of their exercise of official power in designating and retaining the Agency as Broker, the public officials could have been found guilty of extortion as principals, for unlawfully obtaining the consent to the payments under color of official right.

Although in this case the public officials were unaware that petitioner had manipulated them to extort kickbacks, petitioner

> who caused them to act in this way is viewed as having "adopt[ed] not only [their] act but [their] capacity" as well. * * * Since Margiotta could reasonably be found to have caused a public official to commit the act necessary for inducing the Agency's consent to make the kickback payments, he could be convicted of extortion pursuant to the provisions of 18 U.S.C. § 2(b), even though the public official may have been a mere innocent intermediary * * *.

(Pet. App. 45a.) Petitioner challenges the propriety of this holding in three ways. Each is without merit.

a. Petitioner first claims that no public official received or personally transferred to third parties any payment not due him or his office (Pet. 21). But the law is clear that neither direct receipt nor personal transference to third parties is required to sustain a Hobbs Act conviction. *United States* v. *Green*, 350 U.S. 415, 420 (1956); *United States* v. *Trotta*, 525 F.2d 1096, 1098 n.2 (2d Cir. 1975), cert.

denied, 425 U.S. 971 (1976); *United States* v. *Cerilli*, 603 F.2d 415, 420 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980). Indeed such a requirement would make no sense as a matter of law or policy. See *United States* v. *Shirey*, 359 U.S. 255, 261-262 (1959).

b. Petitioner also claims (Pet. 22) that no public official "misused his office to induce payments." But petitioner's liability under Section 2(b) derives from the fact that he caused a public official to use the powers of his office to induce payments from the Williams Agency. This was a misuse of public office even though the incumbent was unaware of petitioner's acts. See, *e.g.*, *United States* v. *Wiseman*, 445 F.2d 792, 795 (2d Cir.), cert. denied, 404 U.S. 967 (1971). Moreover, because it is the exercise of the power of public office to obtain money (without any threats or acts of inducement) that constitutes extortion under color of official right, the fact that the public official himself did not demand payments or make any overt threats is immaterial.[6]

c. Petitioner also argues (Pet. 22-23) that the indictment did not charge, and the jury was not required to find, that the motivation of the Williams Agency focused on the "recipient's office"—*i.e.* the office of the officials who had the power to appoint and dismiss the Agency as Broker of Record.[7] This claim is insubstantial. The indictment specifically alleged that the Williams Agency consented to make the payments because of its reasonably held belief (i) that

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[6]Though the pressure of force, fear, or simple solicitation may render a public official guilty of obtaining money under color of official right, no such affirmative acts are essential if the payments are motivated by the power of public office to help or harm the victim. See, *e.g.*, *United States* v. *Jannotti*, 673 F.2d 578, 594-595 (3d Cir. 1982), cert. denied, No. 81-1899 (June 7, 1982); *United States* v. *Hedman*, 630 F.2d 1184, 1195 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981); *United States* v. *Butler*, 618 F.2d 411, 417 (6th Cir.), cert. denied, 447 U.S. 927 (1980).

[7]As noted above (pages 17-18), the public official whose powers are used to induce the extortionate payments need not be the "recipient."

the public officials of Nassau County and the Town of Hempstead "would appoint or dismiss, as Broker of Record * * * any person whom the [petitioner] * * * told them to appoint or dismiss," and (ii) that if it did not make the payments, it would not be appointed or continued as Broker of Record (Superseding Indictment 12, 13, 15, 16, 18). Moreover, the district court expressly instructed the jury that it should consider "whether or not the payments alleged were, in fact, induced by the conduct of the public official in his official capacity and not solely by conduct of the [petitioner]" (Tr. 3591).

Petitioner's suggestion (Pet. 22-23) that the evidence was insufficient to show such motivation on the part of the Williams Agency is mistaken and in any event does not warrant review. The evidence established that petitioner caused public officials in Hempstead and Nassau County to appoint and retain the Williams Agency as Broker of Record (Pet. App. 12a, 13a). Petitioner himself testified that if the Agency stopped making payments in accordance with his directions, he would have convened a meeting of the Executive Committee of the Republican Party to recommend Williams's replacement as Broker of Record (*id.* at 13a, 49a). Williams's own testimony demonstrated his identical understanding of his obligations (*id.* at 48a-49a). As the court of appeals noted (*id.* at 47a), "It is reasonable to conclude that the Williams Agency consented substantially for the reason that the positions held by the public officials, who were controlled by Margiotta, gave the officials the power to choose another as Broker of Record if the Agency did not consent to the payments."[8]

United States v. *Braasch*, 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975), cited by petitioner (Pet. 22), is simply a case where the public official was the recipient.

[8]Petitioner's suggestion (Pet. 22-23) that Williams, Jr. paid kickbacks because he felt "obligated [to do so] under contract law" is difficult to credit. As the court of appeals expressly found (Pet. App. 51a), "the jury

d. Petitioner concludes by suggesting that he "was held to have committed extortion 'under color of official right' simply because he possessed influence over public officials" (Pet. 23). He urges that the court of appeals' affirmance of his conviction "criminalizes a whole range of conduct that has traditionally been regarded as legitimate lobbying and political activity" (Pet. 24). But petitioner was not convicted of "possess[ing] influence." He was convicted of using his influence to extract kickbacks for himself and his associates in a manner that has long been regarded as illegal.[9] As the Fifth Circuit recently observed in rejecting a similar argument,

> Since [the defendant's] conduct "falls squarely within the 'hard core' of the statute's proscriptions" * * * we adopt the solution of Justice Holmes in *United States* v. *Wurzbach*, 280 U.S. 396, 399 (1930): "[I]f there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by someone whom it concerns."

United States v. *Dozier*, 672 F.2d 531, 540 (5th Cir. 1982), cert. denied, No. 82-60 (Oct. 18, 1982).

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could reasonably infer that Williams did not believe he was carrying out a 'valid contract' from the evidence of Williams's participation in the creation of fictitious property inspection reports, his dissembling testimony before the New York State Investigation Commission, and the decision to reduce the portions of the commissions distributed from the agreed upon fifty percent."

[9]See *supra* page 13. Cf. the New York Lobbying Act, 1981 N.Y. Laws ch. 1040, § 10, which makes it a crime for a lobbyist to be paid a fee contingent on the defeat or passage of legislation. See also 2 U.S.C. 261 *et seq.* It is difficult to believe that one complying in good faith with the statutory regulation of lobbying could be found to have acted with the criminal intent required to sustain a conviction for extortion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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